COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

RE: PETITION OF THE CAPE LIGHT COMPACT FOR APROVAL OF A MUNICIPAL AGGREGATION DEFAULT SERVICE PILOT PROJECT **DTE 01-63**

MOTION FOR RECONSIDERATION OF THE CAPE LIGHT COMPACT

Pursuant to 220 C.M.R. 1.04(5) and 1.11(10), the Cape Light Compact ("Compact") hereby moves for reconsideration of certain conditions in the October 23, 2001 Memorandum Decision in the above-referenced proceeding ("Memorandum") of the Department of Telecommunications and Energy ("Department"). These two conditions, for the reasons set forth below, are neither legally nor factually warranted, and, if not substantially modified or eliminated, will present new market barriers which likely will have the effect of preventing the Compact from consummating an agreement with a supplier to implement its Pilot Program. Additionally, neither one of these two conditions have been applied to any other competitive supply option and there is no legal or factual basis now to saddle the Compact's municipal aggregation – which has been legislatively-authorized and previously approved by the Department – with these burdensome requirements.

Specifically, the Compact objects to the condition "direct[ing it] to compile a list of consumers… who are participating in the Pilot and to make this list available to licensed competitive suppliers upon request." Memorandum at p. 7. The Compact also seeks reconsideration of the condition that the Department "will not approve any power supply agreement that includes such an 'exit fee' provision," *id.*, thus effectively preventing the Compact from negotiating any such terms with a supplier or even giving consumers a chance to

weigh whether the inclusion of such a provision is justified by any commensurate price reductions.

The Compact submitted its plan for the Pilot Project in response to clear statements by the Department and other policymakers that market barriers should be reduced so as to encourage greater consumer opportunities. *See, e.g.*, DTE 01-54 (October 15, 2001). The Compact also was motivated by preliminary pricing information from suppliers that demonstrated potential savings for consumers receiving Default Service. The Compact's intent, as was stated in the Pilot Plan, is to conduct a program to benefit and inform consumers, competitive suppliers, elected and appointed policymakers and other municipalities interested in municipal aggregation.

The Compact appreciates the Department's approval of its concept for a Pilot Project to provide competitive retail supply to Default Service customers. However, the conditions set forth above make that approval unworkable; the suppliers with whom the Compact was negotiating have, in the week or so since the order was issued, confirmed the adverse practical impact that the Compact feared when it first received and reviewed the Memorandum.

The conditions appeared to be premised on two faulty assumptions. First, the Department evidently does not view municipal opt-out aggregation as competitive retail supply, contrary to the remarkably clear legislative intent behind G.L. c. 164, §134. Second, the Department's imposition of the conditions is simply at odds with the realities of the competitive market, such as it is in the Commonwealth.

The Department acknowledges that implementation of the Pilot Project "is consistent with the objective of G.L. c. 164, §134 to promote municipal aggregation." Memorandum at p. 6. But, the Department also concludes that:

> implementation of the Pilot, with its focus on default service customers, may have a chilling effect on suppliers entering the market, thus working counter to the [Restructuring] Act's objective of broadening competitive options available to consumers. The ultimate success of the electric restructuring effort in the Commonwealth relies on the presence of a sufficient number of suppliers competing against one another to provide generation service to consumers …. Implementation of an aggregation plan, such as the Pilot, with its opt-out provision, may discourage competitive suppliers from marketing their services in the near term to default service customers because of their conviction that they can not fairly compete against such a plan and the uncertainty regarding further such efforts throughout the Commonwealth.

Id. [1]

When supplier interests, as is presently the case, dominate the market, many types of consumers, especially small consumers, can be left behind. In such a circumstance (essentially one of "supplier choice" and not "consumer choice"), those who do obtain competitive supply may receive it under contracts that shift the risk from suppliers to the consumer. For example, provisions are often included in contracts that give the supplier the opportunity to terminate the contract under certain conditions but do not give the consumer any such opportunity.

The Compact believes that the General Court approved municipal opt-out aggregation in the Restructuring Act to provide an option for *all* types of consumers to have an opportunity to receive the benefits of competitive supply and to provide consumers, as part of an aggregated group, leverage to negotiate contract provisions that would include consumer guarantees and protections in order to move towards some reasonable risk-sharing with suppliers. As the Department is aware, municipal aggregators must surmount an extensive public process including local and state approvals. For any contract resulting from such a public aggregation, the municipal aggregator is required to notify all customers of the terms of price and service

[1] The Department acknowledges in a footnote "it is plausible that some suppliers may view serving a municipal aggregation load as an attractive opportunity to gain a sizeable portion of market share."

and provide them with the opportunity to "opt-out." Individual consumers are not compelled to participate. G.L. c. 164, §134.

While the Compact has no argument with the Department's theoretical vision of a market in which every individual consumer has a choice, that vision is indisputably not a reality in today's market or the "near-term" one. The demonstrated experience to date is one of suppliers picking and choosing customers and shifting risks to customers with contracts that few, if any, individual customers have the ability to negotiate. In fact, in Massachusetts and other states, suppliers have terminated supply when it is in their economic interest, leaving consumers on higher cost default service.

As a result of a vision of the market which the Compact respectfully submits is inconsistent with what has actually transpired to date, and a legal misconstruction of the statutory option offered by municipal aggregation, the Department then concludes that "two requirements are necessary to balance the Act's and our desire to promote competition and individual choice for default service customers along with the potential benefits of a pilot aggregation plan for default service that compels customer participation." Memorandum at p. 7.

First, the Department requires the Compact to provide customer information to licensed competitive suppliers. *Id*. No other competitive supplier is required to compile and provide such information to other suppliers. To place this burden on the Compact increases the opportunity for competing suppliers to offer loss-leader prices to certain customers to undermine the aggregation. The Compact supplier will be basing a price on the load factor for full-

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Memorandum at p. 6, n. 7. However, the resulting conditions placed on the Pilot are clearly premised

requirements supply for the entire load. There is clearly considerable risk associated with this pricing, but that risk can be evaluated based on usual market conditions and the relationship the supplier plans to build with the customer. However, gauging that risk will be difficult or impossible if the supplier also faces the prospect of advertising the list of participating customers to other suppliers because it takes in unknown interests of another supplier—rather than the interests of the customer. At the very least, it increases the cost to consumers, thus potentially preventing the aggregation from beating Default Service pricing; at the worst it deters suppliers from serving consumers in a municipal aggregation when suppliers could provide generation supply elsewhere and not incur the same risk.

The Department's second related condition concerning an "exit fee" is also not imposed on any other competitive retail supplier or option. *Id.* Even local distribution companies providing Default Service can require a "reconciliation charge" from those consumers who leave Default Service for a competitive supplier. The Department's conclusion – "the application of an 'exit fee' (i.e. a fee or penalty that would be imposed on a consumer that leaves the Pilot to either return to default service or to switch to a different competitive supplier) is unacceptable because it is incompatible with an opt-out approach to aggregation, and has clear anti-competitive implications" – is simply not supported in the statute or the market. *Cf. Id. at p. 6 and G.L. c. 164, §134.*

In the Pilot, the Compact proposed that a consumer be able to return to Default Service at any time at no charge, which is more advantageous than the potential "reconciliation charge" that can be required by a local distribution company and assures no harm to consumers who

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on the opposing perspective that municipal aggregation will chill the market.

participate. The Pilot Plan was deliberately silent on charges for leaving for a competitive supplier because such a condition is usually the subject of negotiations and is included in discussion of other considerations, such as price of supply, guarantees for savings and other economic terms. An "exit fee," if any were to be included in the contract, would undoubtedly be the subject of negotiation. Even if such a term was included, and was subsequently approved by the Compact's governing board, consumers would be required under the Restructuring Act and the Compact's Aggregation Plan to be so notified as part of the opt-out notice and would have an opportunity to choose not to participate if they deemed that the exit fee was not justified by the savings offered.

The Department has stated, without even the benefit of a contract before it, that it simply "will not approve any power supply agreement that includes such an 'exit fee' provision." Memorandum at p. 7. It has thus usurped the ability of the Compact to negotiate this term (which might have eliminated it from a contract in any case), or if it were included, has eliminated the Compact's option to provide it in a form such that each individual consumer could consider participation. This has the effect of reducing consumer choice. At the least, such a condition increases the price any competitive supplier will charge and weakens guarantees and other such terms. At its worst, and the Compact has received some empirical evidence to this effect, it acts to dissuade suppliers from supplying the Pilot when they may impose such a fee at will in other contracts. The vastly preferable way to determine whether any such fee is appropriate is in the context of review of an entire contract, including pricing terms.

The Compact therefore believes the effect of these conditions in the order will diminish, rather than increase, options for consumers and consumer choice.

Additionally, the imposition of these conditions violates the cardinal rule that "a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, the end that the purpose of its framers may be effectuated." *Town of Oxford v. Oxford Water Co.*, 391 Mass. 581, 587-588 (1984), quoting *Hanlon v. Rollins*, 286 Mass. 444, 447 (1934). Instead of harmonizing municipal opt-out aggregation with the rest of the Act – reading municipal aggregation as one form of competitive supply – the Department in essence went out of its way to find them in conflict. *See Peters v. Michienzi*, 385 Mass. 533, 537 (1982)(citations omitted)("It is an established rule of statutory construction that allegedly conflicting provisions of a statute should, if possible, be construed in a way that is harmonious and consistent with the legislative design"); *Mathewson v. Contributory Retirement Appeal Board*, 335 Mass. 610, 615 (1957). Moreover, the specific conditions and restrictions governing municipal aggregation have been effectively supplanted by the Department's imposition of conditions which nowhere appear in the specific aggregation provisions at issue. *See, e.g., TBI, Inc. v. Board of Health of North Andover,* 439 Mass. 9, 18 (2000) ("It is a basic canon of statutory interpretation that 'general statutory language must yield to that which is more specific.'"); *Hallett v. Contributory Retirement Appeal Board,* 431 Mass. 66, 69 (2000).

Finally, the Department also failed to make subsidiary findings here that support its conclusions. *See, e.g., Costello v. Department of Public Utilities*, 391 Mass. 527, 533 (1984). In fact, and as is set forth in this Motion above, the Compact respectfully believes that the only subsidiary findings which could be made about the state of the market in the reasonably

foreseeable future would compel a conclusion that neither condition is warranted from a policy perspective. *See, e.g., Massachusetts Institute of Technology v. Department of Public Utilities*, 425 Mass. 856, 867-873 (1997)(While "reasonable approximation" in light of an "evolving market" may be appropriate, Department must make adequate findings in the decision itself supporting conclusions and speculation.) While the Department has considerable latitude to implement the provisions of the Restructuring Act, that authority must be employed judiciously with a view towards all of the statutory objectives and the realities of the market.

WHEREFORE, the Compact respectfully requests that the Department modify the Memorandum to delete these two conditions.

Respectfully submitted,

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Dated: October 31, 2001